IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SCOTT and RALITA PATTERSON, husband and wife, and their marital community,	)	**No. 27696-1-III**
	)	**Consolidated with**
	)	**No. 28071-3-III**
Appellants,	)	**Division Three**
v.	)	
	)	**UNPUBLISHED OPINION**
NORTHLAND INVESTMENT, INC., a Washington corporation; NORTHLAND RESOURCES, LLC DBA SAPPHIRE SKIES, a Washington limited liability; NOEL KURTZ and JANE DOE KURTZ, husband and wife and their marital community; HELEN WOO, LLC, a Washington limited liability; and TODD BRADBURY and JANE DOE BRADBURY, husband and wife and their marital community,	)	
Respondents.	)	

Brown, J. ─ Scott and Ralita Patterson appeal the summary dismissal of their complaint against Northland Investment, Inc., Noel Kurtz, Northland Resources, LLC (collectively Northland), and Helen Woo, LLC (Woo) arising from Northland's sale to

them of Bell Creek plat Lot 4. Generally, the Pattersons have two main disputes with Northland, giving rise to multiple claims. The first dispute involves a paved road Northland constructed through Lot 4 outside the platted easement. The second dispute involves whether Northland timely provided water to the Pattersons. We conclude genuine material fact issues remain, precluding summary judgment for either party. Accordingly, we reverse the trial court's dismissal of the Pattersons' complaint and its award of attorney fees and costs to Northland and affirm the denial of summary judgment to the Pattersons. Necessarily, we vacate the portions of the April 2009 orders addressing attorney fees and costs and dismissal of the Pattersons' claims.

FACTS

Northland is the developer for the Bell Creek subdivision in Ronald, Washington. It consists of 14 platted lots on undeveloped, sloped, woodlands. Before purchasing Lot 4, the Pattersons received a Bell Creek plat map from Northland showing the location of a 20 foot shared access and utility easement across Lot 4.

In November 2006, the Pattersons signed a purchase and sale agreement (the agreement) with Northland to purchase Lot 4. Northland knew the Pattersons intended to build a structure on Lot 4. The agreement provided "[Northland] shall provide a share in the water system to [the Pattersons], no later than April 30th, 2007." Clerk's Papers (CP) at 58. The agreement specified title was to be free of all encumbrances at closing and it contained feasibility and professional advice clauses. The agreement

reserved "a . . . non-exclusive . . . easement . . . for ingress and egress, utilities, reconstruction, use and maintenance, over, across, under, upon and along all of the existing easements and roadways" that was shown on Exhibit B, the Bell Creek plat. CP at 54. Northland reserved:

> [T]he right to modify the location of the Roadways . . . to meet grade, side slope, approach angles, cuts and fills, and radius requirements of county or municipal road standards . . . . Any such revisions shall not cross the primary building site of the Property.

CP at 55. Northland admits the paved road deviates "slightly" from the platted easement "due to site conditions and topographic constraints." CP at 15. Northland deeded Lot 4 to the Pattersons on December 21, 2006, conveying "such easements for ingress, egress and utilities as depicted" on the Bell Creek plat. CP at 64.

The Pattersons sued Northland, claiming: breach of contract (the agreement), by failing to disclose the correct location of the reserved easement, and by failing to provide them with a share in the water system as specified in the agreement; breach of warranty against encumbrances; fraudulent inducement and/or fraud; negligent misrepresentation; trespass over the paved road; overuse or overburden of easement; and nuisance. The Pattersons sued adjacent owner Woo, for trespass and easement, overuse or overburden related to the paved road and a dirt road running from the paved road to Woo's property. Woo, in turn, sued Northland in a third-party complaint.

The Pattersons moved for partial summary judgment against Northland solely on three claims: breach of contract, breach of warranty against encumbrances, and

trespass. Northland cross-moved for summary dismissal of all claims, but it provided argument solely on the three claims the Pattersons brought on for summary judgment, and argued the Pattersons were not entitled to summary judgment on their fraud and negligent misrepresentation claims because genuine issues of material fact remained.

Mr. Patterson declared he visited Lot 4 before purchasing, but snow and rough terrain limited his view; he noticed the paved road, but he believed it was "in the exact location as the reserved easement represented on the Plat." CP at 43. Based on the plat, he determined his then-planned home "would fit in what would be the buildable area of Lot 4." CP at 43. Further, he declared when discovering the paved road deviated from the easement toward the center of the lot, they abandoned their initial building plan to their damage. Mr. Patterson declared the planned one-story rambler home would not fit "under county codes," necessitating a two-story design. CP at 336.

Mr. Kurtz, referring to the paved road as a driveway, declared the driveway through Lot 4 had been constructed and the building pad graded in fall 2006 and should have been "obvious" to Mr. Patterson. CP at 157. Mr. Kurtz declared Mr. Patterson negotiated a reduced price as "a direct result of the Pattersons' concerns about the location of the driveway that serves Lots 7 and 8." CP at 158. He conceded, "Mr. Patterson is correct that the platted easement location needs to be corrected by a new record of survey to reflect the actual, as-built location of the driveway." CP at 159.

Regarding the water system claims, Mr. Patterson declared he and Mrs.

Patterson "relied on [the agreement's] representation that Lot 4 would get a share in the working water system that would provide us with drinking water by April 30, 2007 through the community well." CP at 43-44. When Mr. Patterson began the building permit process, he discovered Northland had "not obtained the proper water permit for the Bell Creek water system." CP at 46. Mr. Patterson declared he would not have purchased Lot 4 had he known the water would not be "hooked up" to his lot. *Id*. Mr. Patterson declared: "[w]hen I went to get my building permit in October 2008, it was denied due to the lack of an approved water system." CP at 337.

Mr. Patterson dismissed Northland's regulatory impossibility explanations by declaring Northland knew it could have gained approval for a Group A water system and solely "Group B water systems that were caught up in the regulatory changes, not Group A." CP at 338. To support these statements, Mr. Patterson attached a letter to his supplemental declaration from the Washington State Department of Health (DOH) Office of Drinking Water to Mr. Kurtz. The letter is undated, and stated, "[DOH] received your Group B water system approval application package for the Bell Creek water system on January 16, 2007. . . . DOH believes that the proposal is consistent with a proposed Group A water system." CP at 345.

Mr. Kurtz responsively declared the Water User's Agreement granting lot owners an undivided 1/14 interest in the well and water system had been recorded in June 2006 and the Pattersons received their share in their deed. Civil engineer Chad Allen's

declaration elaborates on Northland's regulatory impossibility claim; "neither the State nor the County was processing water system approvals due to the uncertainty in the regulatory situation." CP at 178.

The court granted Northland's motion for summary judgment, but dismissed all Patterson claims, not just the three claims at issue. The Pattersons unsuccessfully moved for reconsideration. In December 2008, the Pattersons appealed. In view of our disposition, we omit the facts regarding attorney fees and costs awarded to Northland. In April 2009, the trial court entered three orders requested by Northland over the Pattersons' objections: (1) dismissing Woo's third-party complaint, (2) findings of fact and conclusions of law regarding attorney fees and an order for more attorney fees, and (3) final judgment orders dismissing the Pattersons' case. This prompted another appeal. We consolidated the Pattersons' appeals.

MOTION TO SUPPLEMENT THE RECORD

After the parties filed briefs here, the Pattersons moved to supplement the record with two letters. The first letter to Northland from Puget Sound Energy relates that its underground electric distribution system follows the paved road, and is not within the assigned easement. The second letter to Northland from DOH similarly relates that the water lines for Bell Creek Lot 4 were installed outside of the platted utility easement. Northland does not object to the Pattersons' motion, conditioned on this court allowing three additional documents into the record that need not be

described.

The Pattersons urge the two letters will help this court resolve its breach of contract claim regarding the easement. Generally, additional evidence on appeal is not accepted unless the six RAP 9.11 criteria are satisfied. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 936-37, 206 P.3d 364 (2009) (citing *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 593-94, 849 P.2d 669 (1993)). The six criteria are:

> (1) [A]dditional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a).

We conclude the Pattersons do not show additional facts are needed to fairly resolve this appeal. Further, the proposed additional evidence will not change the outcome here. RAP 9.11(a). Northland admits the paved road is not located within the reserved easement. Therefore, we deny the Pattersons' motion and do not reach Northland's conditional request to supplement the record.

ANALYSIS

The issue is whether the trial court erred in summarily dismissing the Pattersons' complaint and denying the Pattersons' summary judgment motion.

We review a trial court's summary judgment grant de novo, engaging in the

same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). We may affirm the trial court's summary judgment grant "if it is supported by any grounds in the record." *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331 (2008) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)).

Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.,* 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. *Lybbert,* 141 Wn.2d at 34. "[T]he moving party bears the burden of showing the absence of a material issue of fact." *Swinehart v. City of Spokane*, 145 Wn. App. 836, 844, 187 P.3d 345 (2008) (citing *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994)). Further, "[q]uestions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion." *Id.* (citing *Alexander v. County of Walla Walla*, 84 Wn. App. 687, 692, 929 P.2d 1182 (1997)).

The Pattersons first contend Northland limited its summary judgment motion to their claims for breach of contract, breach of warranty against encumbrances, and trespass, and thus, the court erred in dismissing all other claims. We agree. While Northland moved for summary dismissal of all Patterson claims, it provided argument

solely on the claims for breach of contract, the breach of warranty against encumbrances, and trespass. Northland argued, and we agree, genuine material fact issues remain on the other claims for fraudulent inducement and/or fraud and negligent misrepresentation. In addition, we find that genuine material fact issues remain on the claims for overuse or overburden of easement and nuisance.

Turning to the merits of the breach of contract claim, a contract breach is actionable when the contract imposes a duty, duty breach is established, and the breach proximately causes damage to the one owed the duty. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). The breach need not be material. *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 210, 165 P.3d 1271 (2007).

"We interpret unambiguous contracts as a matter of law." *Paradiso v. Drake*, 135 Wn. App. 329, 334, 143 P.3d 859 (2006) (citing *State v. Brown*, 92 Wn. App. 586, 594, 965 P.2d 1102 (1998)). "When interpreting a contract, our primary objective is to discern the parties' intent." *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493, 116 P.3d 409 (2005) (citing *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). Further, "Washington continues to follow the objective manifestation theory of contracts." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Accordingly, "we . . . determine the parties' intent by focusing on the objective manifestations of the agreement, rather than

on the unexpressed subjective intent of the parties." *Id*. Further, "[w]e generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Id*. at 504.

An encumbrance is "'a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with conveyance of the land in fee.'" *Moeller v. Good Hope Farms*, 35 Wn.2d 777, 785, 215 P.2d 425 (1950) (quoting *Hebb v. Severson*, 32 Wn.2d 159, 167, 201 P.2d 156 (1948)). Here, the Pattersons first argue Northland breached the agreement because Lot 4 was not in the same physical condition as shown on the plat. The Pattersons argue the plat, part of the agreement, is the best evidence of the parties' intent regarding the physical condition of the lot. But intent is a material fact question, and the plat does not establish the exact duty involved. By itself, the plat does not establish a breach of duty imposed by contract. *See Nw. Indep. Forest Mfrs.*, 78 Wn. App. at 712. The Pattersons rely on the following agreement language:

> Unless otherwise specified in this Agreement, title to the Property at closing shall be free of all encumbrances and defects that materially interfere with [the Pattersons'] intended use of the Property. Presently recorded reservations, covenants, conditions and restrictions, easements, and existing building or zoning regulations or restrictions shall not be considered encumbrances or defects.

CP at 56.

When the Pattersons purchased Lot 4, the property was burdened by the recorded easement identified on the plat, but the paved road strayed from the

easement shown. Northland argues they have the right under the agreement to move the recorded easement to conform to the location of the paved road:

> [Northland] expressly reserves the right to modify the location of the Roadways . . . to meet grade, side slope, approach angles, cuts and fills, and radius requirements of county or municipal road standards . . . . Any such revisions shall not cross the primary building site of the Property.

CP at 55.

Even if Northland has the right to move the recorded easement to conform to the paved road, other material facts remain. The parties dispute whether the easement represents a road or driveway; different governmental standards apply and may affect relocation. Moreover, the paved road breaches the agreement if it "materially interfere[s] with [the Pattersons'] intended use of the Property." CP at 56. The parties hotly dispute if the existing road does, or any revised road will, "cross the primary building site of the Property." CP at 55. Construing the facts and reasonable inferences for the Pattersons as we must, genuine issues of material fact remain regarding breach of duty. *Lybbert,* 141 Wn.2d at 34. Thus, the trial court erred in summarily dismissing the Pattersons' breach of contract claim regarding the easement.

Northland relies on *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 63 P.3d 125 (2003) to argue the Pattersons had constructive notice of the condition of Lot 4. In *Denaxas*, the purchase and sale agreement contained an erroneous legal description of the subject property, and an erroneous approximation of the property's square footage. *Id.* at 658. A preliminary title report and the deed and

deed of trust contained the correct legal description, and a survey contained the correct square footage. *Id*. at 659-61. Based on the documents, the *Denaxas* court held the purchaser had constructive knowledge of the correct legal description and square footage. *Id*. at 667. Here, no documents disclosed the existence of the paved road on Lot 4. Both the agreement and the deed referenced one recorded easement identified on the plat. Therefore, *Denaxas* is inapposite.

Northland argues the feasibility and the professional advice clauses obligated the Pattersons to inspect the property, thus any error regarding the road's location should have been known. But the clauses do not affect Northland's contractual duty that "title to the Property at closing shall be free of all encumbrances and defects that materially interfere with [the Pattersons'] intended use of the Property." CP at 56.

Next, regarding the water system contract claims, the agreement provided "[Northland] shall provide a share in the water system to [the Pattersons], no later than April 30th, 2007." CP at 58. The Pattersons contend Northland breached the agreement by failing to provide a "certified" water system by that date. Northland concedes: "Northland has never argued that the Agreement did not contemplate a certified water system." Resp't's Br. at 30. And, "[i]t is also undisputed that the water system was not certified on April 30, 2007." *Id.*

But Northland argues it was excused from the certification requirement under the doctrine of impossibility due to regulatory changes. The Pattersons argue Northland

did not assert this defense in its answer, as required by CR 8(c), and therefore, it should not be considered. "In pleading to a preceding pleading, a party shall set forth" specific defenses set forth in the rule, "and any other matter constituting an avoidance or affirmative defense." CR 8(c). Impossibility is an affirmative defense. "'Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties.'" *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522 (1996) (quoting *Bernsen v. Big Bend Elec. Coop.*, 68 Wn. App. 427, 433-34, 842 P.2d 1047 (1993)).

However, affirmative pleading is not always required: "'[w]here a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless.'" *Id*. (quoting *Mahoney v. Tingley*, 85 Wn.2d 95, 100-01, 529 P.2d 1068 (1975)). Here, while Northland did not assert the affirmative defense of impossibility in its answer, the noncompliance is harmless. Northland argued the defense to the trial court, after it became clear that the Pattersons were challenging the lack of certification of the water system.

"The doctrine of impossibility and impracticability discharges a party from contractual obligations when a basic assumption of the contract is destroyed and such destruction makes performance impossible or impractical, provided the party seeking relief does not bear the risk of the unexpected occurrence." *Tacoma Northpark, LLC v. Nw., LLC*, 123 Wn. App. 73, 81, 96 P.3d 454 (2004) (citing *Pub. Util. Dist. No. 1 of*

Lewis County v. Wash. Pub. Power Supply Sys., 104 Wn.2d 353, 363-64, 713 P.2d 1109 (1985)). The doctrine excuses contract performance "on a showing of 'extreme and unreasonable difficulty, expense or injury,'" not "because it became 'more difficult or expensive than originally anticipated' to keep contractual obligations." *Id*. (quoting *Pub. Util. Dist. No. 1 of Lewis County*, 104 Wn.2d at 364).

Northland submitted Mr. Allen's declaration relating that water systems were not being approved in April 2007. In dispute, Mr. Patterson declared:

> On the water issue, since early 2007 – before their obligation to us was due (April 30, 2007) – [Northland] knew that the state required the Bell Creek water system to be a Group A water system, not a Group B water system. . . . [I]t was only Group B water systems that were caught up in the regulatory changes, not Group A.

CP at 338. In support, Mr. Patterson attached an undated letter to his supplemental declaration from DOH Office of Drinking Water to Mr. Kurtz, partly stating: "[DOH] received your Group B water system approval application package for the Bell Creek water system on January 16, 2007. . . . DOH believes that the proposal is consistent with a proposed Group A water system." CP at 345. Given this dispute, genuine issues of material fact remain regarding whether Northland could have obtained certification for the water system by the April 30, 2007 agreement deadline. Thus, the trial court erred in granting summary judgment on the water system claim.

Regarding the breach of warranty against encumbrances claim, Northland conveyed Lot 4 to the Pattersons by bargain and sale deed on December 21, 2006.

See RCW 64.04.040 (setting forth the form for a bargain and sale deed). The deed partly stated Northland "does hereby grant, bargain, sell, convey and confirm" to the Pattersons the property identified as Lot 4. CP at 64. A bargain and sale deed contains a warranty against encumbrances against the grantor: "[t]hat the grantor was seized of an indefeasible estate in fee simple, free from encumbrances, done or suffered from the grantor, except the rents and services that may be reserved." RCW 64.04.040.

The warranty against encumbrances is a present covenant, "and, if breached at all, is broken at the time it is made." *Moore v. Gillingham*, 22 Wn.2d 655, 661, 157 P.2d 598 (1945). Because the paved road admittedly does not align correctly with the easement conveyed with the property, the paved road arguably breached the warranty against encumbrances. We conclude genuine material fact issues remain on this claim. Accordingly, the trial court erred in granting summary judgment in favor of Northland.

Finally, regarding the Pattersons' trespass claims against Northland, we decline to consider them because the Pattersons do not provide supporting argument or citations to legal authority. *See* RAP 10.3(a)(6).

CONCLUSION

We reverse the trial court's summary dismissal of the Pattersons' claims and complaint because material fact issues remain. For the same reason, we affirm the trial

court's denial of the Pattersons' summary judgment motion, making it unnecessary to address Northland's related contentions about shortcomings in the Pattersons' opening brief. We reverse the trial court's awards for attorney fees and costs. We deny attorney fees to either party for this appeal. Necessarily, we vacate the April 2009 orders addressing attorney fees and costs and dismissal of the Pattersons' claims and do not address whether the trial court improperly proceeded without this court's permission. We express no opinion regarding the Woo's third-party complaint because we have received no briefing from either party on that subject. Because the Pattersons prevail, they are entitled to costs for this appeal.

Affirmed in part. Reversed in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.